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IN THE

Supreme Court of the United States

No. 111—October Term, 1960

BURTON N. PUGACH,

Petitioner,

against

ISIDORE DOLLINGER, District Attorney of Bronx County, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF LOUIS J. LEFKOWITZ, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, *AMICUS CURIAE*, IN SUPPORT OF THE RESPONDENTS

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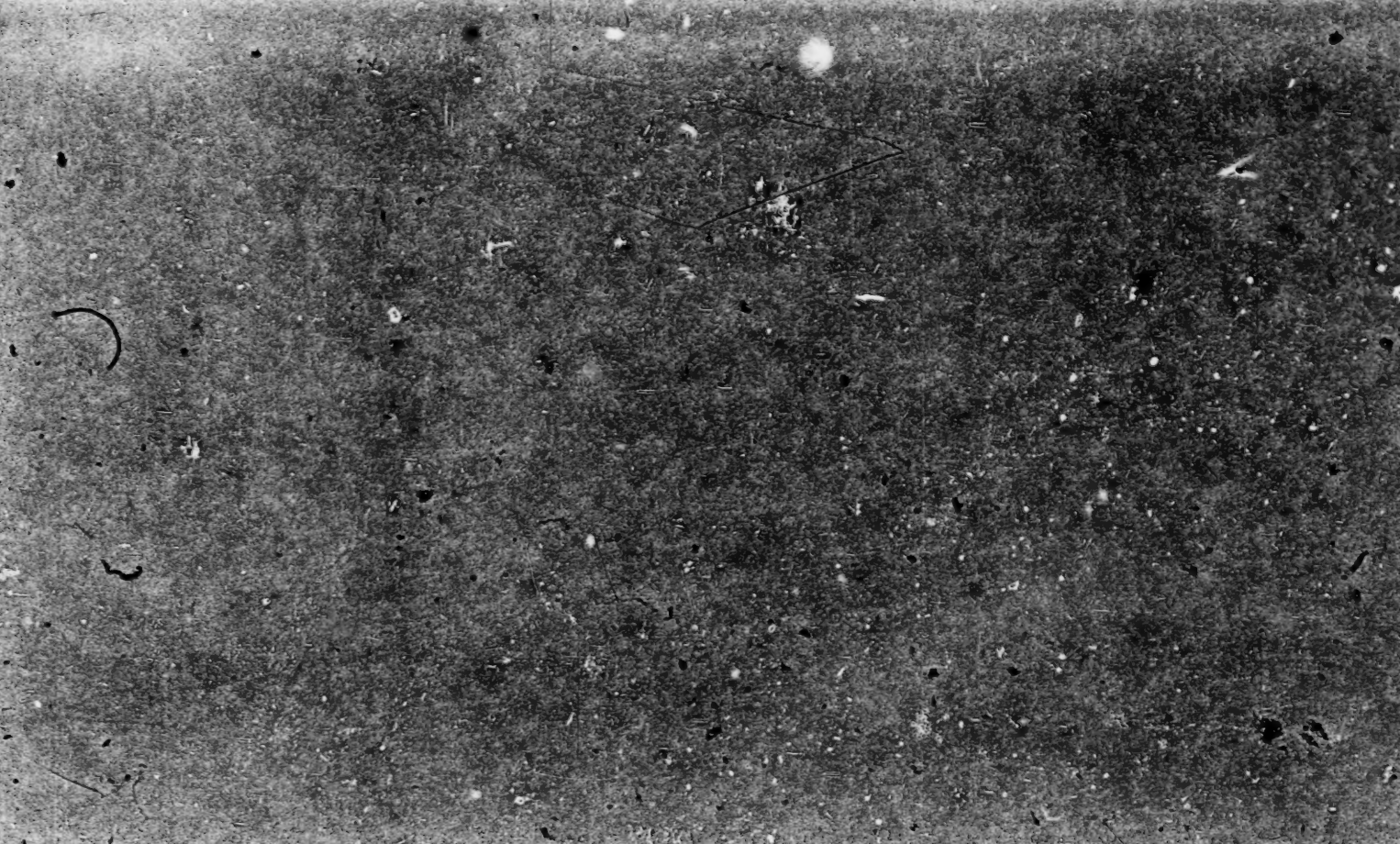

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Interest of the *Amicus Curiae*

By seeking to enjoin the use of wiretap evidence in a State criminal proceeding, this action challenges a practice and rule of evidence authorized by the statutes of New York State (N. Y. Penal Law §§ 743, 745, N. Y. Code of Criminal Procedure § 813-a), and by court decisions of both this State and of the United States Supreme Court. This action further seeks to impose a federal rule of evidence

upon state courts, thus further limiting the powers reserved to the states by the federal Constitution. Section 71 of the Executive Law of the State of New York charges the Attorney General of this State with the duty of defending and upholding the constitutionality of State statutes. He is further authorized to appear on behalf of the State in all actions or proceedings in which it is interested. This brief is, therefore, filed in pursuance of these duties and in accordance with Rule 42 of this Court.

Opinions Below

The decision of the Court of Appeals, Second Circuit, issued on April 14, 1960, is reported at 277 F. 2d 739. The decision of the United States District Court for the Southern District of New York, issued January 13, 1960, is reported at 180 F. Supp. 66.

Constitutional Provisions and Statutes Involved

Federal Communications Act of June 19, 1934, § 605 (47 U. S. C. § 605):

> "No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person *not being authorized* by the sender shall intercept any com-

munication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

United States Constitution, Article X:

"Powers Not Delegated, Reserved to States and People Respectively.—The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

New York Penal Law, § 738 (McKinney's Consolidated Laws of New York, Book 39, Part 1, § 738):

"§ 738. EAVESDROPPING

A person:

1. not a sender or receiver of a telephone or telegraph communication who wilfully and by means of instrument overhears or records a telephone or telegraph communication, or who aids, authorizes, employs, procures or permits another to so do, without the consent of either a sender or receiver thereof; or

2. not present during a conversation or discussion who wilfully and by means of instrument overhears or records such conversation or discussion, or who aids, authorizes, employs, procures or permits another to so do, without the consent of a party to such conversation or discussion; or

3. who, not a member of a jury, records or listens to by means of instrument the deliberations of such jury or who aids, authorizes, employs, procures or permits another to so do; is guilty of eavesdropping."

New York Penal Law, § 739 (McKinney's Consolidated Laws of New York, Vol. 39, Part 1, § 739):

"§ 739. Exemption

There shall be exempt from the provisions of this article:

1. eavesdropping pursuant to an *ex parte* order granted pursuant to section eight hundred thirteen-a of the code of criminal procedure;

2. eavesdropping, as described in subdivision two of section seven hundred thirty-eight of this article, by a law enforcement officer pursuant to section eight hundred thirteen-b of the code of criminal procedure without an *ex parte* order obtained pursuant to section eight hundred thirteen-a of said code;

3. the normal operation of a telephone or telegraph corporation; and

4. the normal use of the services and facilities furnished by such corporation pursuant to its tariffs."

New York Code of Criminal Procedure, § 813-a (McKinney's Consolidated Laws of New York, Vol. 66, Part 3, § 813-a):

"§ 813-a. *Ex parte* order for eavesdropping

An *ex parte* order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any

justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead[1] or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same."

Questions Presented

Does § 605 of the Federal Communications Act have the effect of prohibiting the use in state courts of evidence presented in violation of that section, even though such use is authorized by state statutes and court decisions?

[1] So in original. Probably should be "overheard".

Does a prospective violation of § 605 constitute a situation in which the federal courts are justified in interfering with state court procedures by enjoining such a violation?

Statement

An indictment, returned by a Grand Jury of Bronx, County, New York, charged the petitioner with the crimes of burglary in the second degree, maiming, assault in the second degree and conspiracy, all crimes in violation of the penal statutes of the State of New York.

Respondents, or their agents, on or about June 15, 1959, procured an order of the New York Supreme Court, pursuant to New York Code of Criminal Procedure, § 813-a, permitting petitioner's office telephone wires to be tapped. The wires were so tapped and the contents of the wiretaps divulged to the Grand Jury. The District Attorney now proposes to use the wiretap evidence at the trial of the indictment.

The present action was brought by the petitioner in the United States District Court for the Southern District of New York against the District Attorney of Bronx County and the Police Commissioner of the City of New York for a permanent injunction restraining the use by them, on the forthcoming trial, of the evidence procured by the use of wiretaps. A motion for a preliminary injunction was denied and the complaint dismissed by the District Court.

An appeal was thereupon taken to the Court of Appeals, Second Circuit, and a motion made for a stay pending appeal. This latter motion was granted by order dated February 11, 1960 (275 F. 2d 503). However, on the merits of the appeal, the decision of the District Court, dismissing the complaint, was affirmed.

Petitioner contends that since this Court, in *Benanti* v. *United States* (355 U. S. 96 [1957]), held that the State statutory and constitutional authority for wiretaps is void, an injunction should be granted barring the use of such evidence at the trial, for if it is used he will be without remedy because under the rule of *Schwartz* v. *Texas* (344 U. S. 199 [1953]), the use of illegally obtained evidence in state criminal proceedings will not invalidate a conviction.

Summary of Argument

I. Federal Communications Act, § 605, is a provision of federal substantive law which was not intended by Congress to interfere with state court procedural rules, an interpretation which has been affirmed many times by this Court.

II. The federal equity power should not be employed to interfere with state court processes, by the imposition on state courts of federal rules of evidence and practice.

POINT I

Federal Communications Act, § 605, as interpreted by decisions of this Court, does not bar the use of wiretap evidence in state courts. No reason has been shown in this proceeding for any alteration of those decisions.

It is the contention of the Attorney General of New York, in this proceeding, that the past decisions of this Court have made it abundantly clear that the prohibition of divulgence of the contents of telephone messages, contained in Federal Communications Act, § 605, does not impose a rule of evidence upon the courts of the states which would prevent the use of wiretap evidence therein,

and further that those decisions which have imposed such a rule upon the federal courts and federal officers have clearly and carefully distinguished cases involving state courts. Petitioner in this proceeding has shown no persuasive or substantial reason for a new interpretation contrary to such long standing precedent.

It may be well to review here the development of the rules regarding the use of wiretap and other illegally obtained evidence. Prior to the enactment of the Federal Communications Act of 1934, wiretap evidence was being employed by federal officers in federal courts and its use approved by this Court upon the same reasoning that has since been applied to its use in state court proceedings.

In *Olmstead* v. *United States* (277 U. S. 438 [1928]), this Court considered the question of whether federal use of wiretapping violated the provisions of the Fourth and Fifth Amendments of the federal Constitution. In that case wiretapping by federal agents led to a discovery of a conspiracy to violate the National Prohibition Act. Holding that such acts did not constitute a violation of constitutionally guaranteed rights, this Court stated (pp. 465-466):

> "Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment."

That "common law of evidence" the Court described as follows (pp. 466-467):

> "The common law rule is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained."

The necessity for direct legislation prohibiting the use of such evidence was demonstrated by the delineation of the policy considerations which prevented the courts from adopting their own rule in this regard. That policy was stated in these words (p. 468):

> "A standard which would forbid the reception of dence if obtained by other than nice ethical con-.uct by government officials would make society suffer and give criminals greater immunity than has been known heretofore. In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it."

Some years thereafter the Congress adopted the Federal Communications Act which predominantly related to federal preemptions of the control of radio broadcasting and telephonic communications. As a part of this statute, § 605 prohibited the divulgence of the contents of telephone messages without the consent of the sender. This Act provided the specific legislation referred to by the Court in the *Olmstead* case. That the basic principle relating to common law rules of evidence enunciated in that case has not been changed by either the statute or subsequent decisions of this Court, was amply demonstrated in 1952 on the decision of *On Lee* v. *United States* (343 U. S. 747). That case involved a conviction for the illegal sale of narcotics on the basis of evidence procured as a result of the use of electronic eavesdropping devices by federal narcotics agents. No violation of § 605 was involved. In affirming the conviction this Court stated (p. 755):

> "In order that constitutional or statutory rights may not be undermined, this Court has on occasion

> evolved or adopted from the practice of other courts exclusionary rules of evidence going beyond the requirements of the constitutional or statutory provision. *McNabb* v. *United States*, *supra* [318 U. S. 332]; *Weeks* v. *United States*, 232 U. S. 383. In so doing, it has, of course, departed from the common law rule under which otherwise admissible evidence was not rendered inadmissible by the fact that it had been illegally obtained. Such departures from the primary evidentiary criteria of relevancy and trustworthiness must be justified by some strong social policy. In discussing the extension of such rules, and the creation of new ones, it is well to remember the remarks of Mr. Justice Stone in *McGuire* v. *United States*, 273 U. S. 95, at 99: 'A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule.' "

The Court has continued, in its decisions, to follow the common law rule in regard to the admissibility in state courts of illegally obtained evidence, insofar as the methods employed in obtaining the evidence do not "shock the conscience" or "offend a sense of justice" and thereby directly involve violation of constitutionally protected rights (*Rochin* v. *California*, 342 U. S. 165 [1952]; *Wolf* v. *Colorado*, 338 U. S. 25 [1949]; *Irvine* v. *California*, 347 U. S. 128 [1954]; cf. *Screws* v. *United States*, 325 U. S. 91 [1945]). These cases involved violations by state officers of constitutionally protected rights, a situation not involved here.

When called upon to interpret the prohibition of § 605 in respect to the use of evidence, in violation thereof, in both federal and state courts, this Court adopted certain precise rules. In *Nardone* v. *United States* (302 U. S. 379 [1937]), the direct divulgence of the contents of intercepted telephone communications was prohibited to *federal officers*

in a *federal court* proceeding. In the second *Nardone* case (308 U. S. 338 [1939]) the indirect use of evidence obtained by wiretaps was prohibited to federal officers in federal court proceedings. *Weiss* v. *United States* (308 U. S. 321 [1939]) logically held that insofar as federal proceedings were involved, the prohibition of § 605 extended to the interception of both intrastate and interstate communications.

In *Schwartz* v. *Texas* (344 U. S. 199 [1952]) the Court was confronted by the problem of the use of evidence obtained by *state officers*, using wiretaps, in *state court* proceedings. It was contended that because this evidence would be inadmissible in federal courts, a conviction obtained in state courts by the use of such evidence would also be invalid. This argument, however, was rejected by this Court as it stated (p. 201):

> "Although the intercepted calls would be inadmissible in a federal court, it does not follow that such evidence is inadmissible in a state court. Indeed, evidence obtained by a state officer by means, which would constitute an unlawful search and seizure under the Fourth Amendment to the Federal Constitution is nonetheless admissible in a state court, *Wolf* v. *Colorado*, 338 U. S. 25, while such evidence if obtained by a federal officer would be clearly inadmissible in a federal court. *Weeks* v. *United States*, 232 U. S. 383. The problem under § 605 is somewhat different because *the introduction of the intercepted communications would itself be a violation of the statute, but in the absence of an expression by Congress, this is simply an additional factor for a state to consider in formulating a rule of evidence for use in its own courts.* Enforcement of the statutory prohibition in § 605 can be achieved under the penal provisions of § 501." [Emphasis supplied.]

In the light of the above language, the *Benanti* case (*Benanti* v. *United States*, 355 U. S. 96 [1957]) actually

added no new concepts to the rules already laid down by this Court. The only difference there was that the case involved evidence procured by state wiretaps introduced in federal courts. The Court there reiterated the rule previously enunciated in these words (p. 100):

> "The crux of those decisions is that the plain words of the statute created a prohibition against any persons violating the integrity of a system of telephonic communication and that evidence obtained in violation of the prohibition may not be used to secure a federal conviction. * * * We hold that the correct application of the above principle dictates that evidence obtained by means forbidden by § 605, whether by state or federal agents, is inadmissible in federal court."

As was pointed out in the opinion of the Court of Appeals, Second Circuit, in the instant case (277 F. 2d, at p. 742), the Court in *Benanti* carefully distinguished the decision in *Schwartz* v. *Texas*, stating (355 U. S. at pp. 101-102):

> "In the instant case we are not dealing with a state rule of evidence. Although state agents committed the wiretap, we are presented with a federal conviction brought about in part by a violation of federal law in this case in a federal court."

There has been, therefore, no departure by this Court from the principle consistently held that the inadmissibility of evidence in federal courts does not prescribe a rule of state procedure and that § 605 does not create a new rule of evidence for state courts. The rule still prevails that illegally obtained evidence may be used in state court proceedings.

Petitioner argues for a reversal of the rule by emphasizing the widespread use of wiretapping by local officials

in criminal investigations, implying that multiplicity of violations of § 605 must lead to a different rule—that by an increase in numbers of overall offenses, any single violation becomes that much more unethical. However, such reasoning is not persuasive. As this Court stated in *Irvine* v. *California*, *supra* (347 U. S. at pp. 133-134):

> "We are urged to make inroads upon *Wolf* by holding that it applies only to searches and seizures which produce on our minds a mild shock, while if the shock is more serious, the state must exclude the evidence or we will reverse the conviction. * * * We think, too, that a distinction of the kind urged would leave the rule so indefinite that no state court could know what it should rule in order to keep its processes on solid constitutional ground."

Quantity of violation is no criterion. If the violation of federal law offends the conscience of the Court in many cases it should offend it in one. But the courts have held that illegally obtained evidence may be admitted in state courts, including wiretap evidence, without regard to the frequency of violation of federal law by state officers. Petitioner's argument shows no reason why the rule should now be changed. This being so the rule of the *Schwartz* case should be reaffirmed.

POINT II

Federal Courts should not intervene in state criminal proceedings to suppress the use of evidence which this Court has held not to vitiate a conviction if admitted.

Petitioner contends that because a violation of § 605 constitutes a federal crime, the federal courts should interfere with state criminal proceedings to prevent a prospective commission of such a crime and further that § 605

constitutes a civil rights statute justifying interference with state courts by the use of the injunctive process.

As has often been indicated by the courts, one of the most delicate areas in maintaining the balance of our federal system is that of the administration of the courts. This concern has led the federal courts to generally refuse to intervene with state processes by the use of the federal equity power. It is essential to the preservation of the balance of power between the state and federal governments that there be reserved to the states autonomy in the administration of their courts and that the federal courts refuse to exercise general supervisory powers over the trial procedures of the states. This principle was recognized by both the Courts below in the instant case. The District Court wrote (180 F. Supp., at pp. 70-71):

> "Since the Benanti case there is little doubt that state officers who engage in telephone wiretaps and divulge the contents of communications so obtained not only are acting in violation of the federal statute but are committing a federal crime. * * *
>
> However, it does not follow that plaintiff is entitled to an injunction against the introduction of evidence so obtained at a state criminal trial. As was made abundantly clear in *Schwartz* v. *Texas*, *supra*, the question of whether such evidence is admissible in a state criminal trial has been left for the states to determine. * * *
>
> Plaintiff is not entitled to injunctive relief from this court. The federal courts will not exercise their equity powers to disturb the delicate balance of our federal system by interference with or embarrassment of criminal proceedings in the state courts."

Again, in affirming the District Court, the Court of Appeals, Second Circuit, stated (277 F. 2d, at pp. 742-743):

"Both Congress and the Supreme Court have often indicated their concern for the preservation of the balance between the states' administration of their laws and the use of federal equity power by restriction or withholding of the power of the federal courts. See, *e. g.*, 28 U. S. C. §§ 1342, 2283; *Stefanelli* v. *Minard*, *supra*; *Watson* v. *Buck*, 1941, 313 U. S. 387, 61 S. Ct., 962, 85 L. Ed. 1416; *State of Maryland* v. *Soper*, 270 U. S. 9, 46 S. Ct., 185, 70 L. Ed. 449; *Id.*, 270 U. S. 36, 46 S. Ct. 192, 70 L. Ed. 459 and 1926, 270 U. S. 44, 46 S. Ct. 194, 70 L. Ed. 462. Moreover, Congress, in § 501 of the Communications Act, 47 U. S. C. A. § 501, has provided that violation of § 605 shall be a misdemeanor, and we have held that § 605 creates a civil action for damages in favor of one whose line was tapped. *Reitmeister* v. *Reitmeister*, 2 Cir., 1947, 162 F. 2d 691. Finally, we cannot overlook the long recognized principle of equity, based upon the policy of preserving the right to jury trial, that a court should not enjoin the the commission of a crime. With those factors in mind, we do not think that a federal court should interfere with the prosecution of a state criminal proceeding in order to provide an additional means of vindicating any private rights created by § 605."

This very issue of an application for an injunction to restrain the use in state courts of illegally obtained evidence was directly raised in *Stefanelli* v. *Minard* (342 U. S. 117 [1951]), referred to in the opinion quoted above. This Court there stated (pp. 120, 123):

"For even if the power to grant the relief here sought may fairly and constitutionally be derived from the generality of language of the Civil Rights Act, to sustain the claim would disregard the power of courts of equity to exercise discretion where in a matter of equity jurisdiction, the balance is against the wisdom of using their power. Here the considerations governing that discretion touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States.

> We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure. * * *
>
> The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue."

This same concern for the disruption of state judicial processes was expressed by Judge MADDEN, dissenting from the granting of a temporary stay in the instant case, when he stated (275 F. 2d at pp. 508-509):

> "What this Court is asked to do in the instant case is to hold that it is a violation of due process of law for a State to apply a rule of evidence which is the rule in a majority of the States of the United States. Can it be that the essentials of 'ordered liberty' of decent and rational process of law have been hidden from so many courts and judges and juristic authorities during so many years, and have now at last been revealed, and only to this Court?
>
> The instant petition urges the Federal District Courts to go into the business of supervising the proceedings in State Courts in the day-to-day activities; to take a seat on the bench beside the State Court Judge and direct him how to rule on the admission of evidence offered at the trial. It would be hard to imagine a more intolerable practice, even if it were indulged in by judges of higher rank, but in the same judicial hierarchy."

Other cases involving issues of prime importance in the development of constitutional principles have nonetheless

expressed this same refusal to interfere with state court proceedings. In *Douglas* v. *Jeannette* (319 U. S. 157 [1943]), concerning as it did rights guaranteed under the First Amendment to the United States Constitution, this Court refused to enjoin a threatened state criminal prosecution, holding (pp. 162-163):

> "The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the judiciary Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; * * *
>
> It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution on good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in a criminal case as in a suit for an injunction."

Any injury to the petitioner resulting from the use of wiretap evidence is not so "clear and imminent." The prospective loss of his State liquor license or his license to practice law in New York would not be a direct result of the use of this evidence as it was in *Burack* v. *State Liquor Authority of State of New York* (100 F. Supp. 161 [D. C.

E. D. N. Y., 1958]). Such consequences would be indirect results of his conviction, if any, of a crime in New York State. The admissibility of the evidence in cases such as this should not depend upon indirect and speculative consequences, but only upon direct results.

If the courts will not intervene in criminal prosecutions where a violation of constitutional rights is alleged, how much less should they intervene when only statutory violations, not constitutional guaranties, are concerned.

Other considerations leading to the justifiable reluctance of federal courts to intervene in state proceedings by imposing federal rules of evidence are clearly demonstrated in this Court's opinion in *Irvine v. California, supra*, where it is stated (pp. 134-137):

> "Whether to exclude illegally obtained evidence in federal trials is left largely to our discretion, for admissibility of evidence is governed 'by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.' Fed. Rules Crim. Proc., 26. As we have pointed out, reason has led state courts to differing conclusions, but about two-thirds of them to acceptance of the illegally obtained evidence. What actual experience teaches we really do not know. Our cases evidence the fact that the federal rule of exclusion and our reversal of conviction for its violation are not sanctions which put an end to illegal search and seizure by federal officers. * * * There is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures than those of states that admit it. * * *
>
> It must be remembered that petitioner is not invoking the constitution to prevent or punish a violation of his federal right recognized in *Wolf* or to recover reparations for the violation. He is invoking it only to set aside his own conviction of crime. That the rule of exclusion and reversal results in the escape of guilty

persons is more capable of demonstration than that it deters invasions of rights by the police. The case is made, so far as the police are concerned, when they announce that they have arrested their man.[3] Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches. * * *

But the admission of the evidence does not exonerate the officers and their aides if they have violated defendant's constitutional rights. It was pointed out in *Wolf* v. *Colorado*, *supra*, that other remedies are available for official lawlessness, * * *"

The remedies above referred to include civil actions for damages (*Reitmeister* v. *Reitmeister*, 162 F. 2d 691 [2d Cir., 1947], citing *Newfield* v. *Ryan*, 91 F. 2d 700, 703 [5th Cir. 1937]; *United States* v. *Goldstein*, 120 F. 2d 485, 490 [2d Cir. 1941]), and federal criminal prosecutions for violation of the statute (*United States* v. *Gin*, 247 F. 2d 860 [2d Cir. 1957]).

As this Court pointed out in *Wolf* v. *Colorado*, *supra*, these other remedies are of greater importance in that they also serve to protect the innocent person whereas the remedy of injunction would protect only those against whom incriminating evidence had been uncovered. In that case the Court stated (338 U. S., at pp. 30-33):

"The jurisdictions which have rejected the *Weeks* doctrine have not left the right to privacy without other means of protection. Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to

remand such persons, together with those who emerge scatheless from a search to the remedies of private action and such protection as internal discipline of the police, under the eyes of an alert public opinion, may afford. Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective. * * * We cannot brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence. There are, moreover, reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under State or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of the police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country."

All these considerations clearly demonstrate the wisdom of the policy of non-interference in state criminal proceedings by federal courts. Petitioner has not shown any overriding considerations which would warrant the overturning of this policy and the injection of federal supervision into the field of state judicial processes. It is submitted that the interests of our federal system of government are best served by the preservation of the independence of the state courts and that the decisions of the Court below should, therefore, be affirmed.

CONCLUSION

The judgment of the United States District Court and the judgment of the United States Court of Appeals should be affirmed.

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Respectfully submitted,

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